FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Number 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

APPELLEES' BRIEF.

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IN THE

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THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

APPELLEES' BRIEF.

STATEMENT.

The statement of facts herein by the Appellant, and the history of the case, call for no further statement or recital from the Appellees.

The federal question involved goes to the right of the state to adopt a statutory form of insurance policy, including the provision for compulsory appraisal of the amount of the loss.

The non-federal ground of the decision has been pointed out in the Appellees' brief to the jurisdiction, and goes to the question of voluntary contract.

ARGUMENT.

We advance these two propositions:

First: That the state has the right, in the exercise of its police power, to prescribe a standard form of fire insurance policy, and require that there be incorporated therein a compulsory arbitration provision determining the amount of the loss.

Second: The contract here in question was the voluntary contract of the parties, without regard to statute.

I.

COMPULSORY APPRAISAL OF THE AMOUNT OF LOSS IS WITHIN THE POLICE POWER OF THE STATE.

The Minnesota statute providing for the standard form of fire insurance policy is set out in full in Appellant's brief. The four distinguishing characteristics of the statute are:

1. The form of policy is compulsory.
2. The amount of the loss in case of disagreement shall be determined by appraisers.
3. The appraisal shall be binding and conclusive upon the parties.
4. The award is a condition precedent to the bringing of an action upon the policy.

Contrary to the contention of counsel, this Minnesota form of standard policy is not peculiar to this state, but it is identical in substance with the standard form in use in many, if not most of the states of the Union. The compulsory use of the prescribed form, the appraisal in case of disagreement, the binding effect of the appraisal, and the award being a condition

precedent to action, are common to most of the states. This provision making the award a condition precedent to action takes many different forms, but the effect is the same in all. There are a few states in which the award is not a condition precedent, and one or two states in which the appraisal is prima facie and not conclusive, but in a large majority of the states the standard form is compulsory, the appraisal in case of disagreement is compulsory unless waived, and is binding when made and is a condition precedent.

Counsel's contention that the Minnesota provision for appraisal is distinct from that of other states is not borne out by an examination of their statutes, as nearly all provide that in case of a disagreement, either party may demand an appraisal and, upon such demand, each shall name an appraiser who, in turn, shall select the umpire. As illustrative see:

Mich. Compiled Laws, 1929—Standard fire policy;
Pa. Cumulative Statutes 1928, Sec. 12490-B-523;
West Va. New Code of 1931, P. 897—Standard fire policy;
Maine Code of 1930—Standard fire policy.

* * * * *

Let us assume, for the purpose of argument, that the construction placed upon this statute by the Supreme Court of the State of Minnesota goes a step beyond the construction that the Courts of other states have placed upon similar statutes. Then the only difference between the Minnesota statute and the statutes of other states would be to compel the insurer to submit to an arbitration of the loss, as well as the insured.

It must be conceded that, since early times, the insured has been compelled to submit to arbitration as to the amount of the loss, as a condition precedent to an action on the policy. It cannot be that the constitutional rights of the insured are

of less importance in the eyes of the law than the constitutional rights of the insurer. They must be held to have equal rights under the law.

In spite of this fact, we find no case where the insured has been declared to have been deprived of his constitutional rights. Such a theory would have a stronger basis, both in law and logic, on the ground that it would deprive the insured of the equal protection of the law, than the theory advanced by counsel in this case. The long acquiescence in this provision by the insured is in itself a powerful argument for its reasonableness and validity, as applied to both insurer and insured.

While there may be a difference in the wording, the only difference in substance between the Minnesota standard policy and that of a majority of the other states, (and that difference is not material here) is in the interpretation put upon the Minnesota statute by the Minnesota Supreme Court, in the late case of

Abramovitz v. Continental Ins. Co., 170 Minn. 215, 212 N. W. 449,

to the effect that, in case the insurer refuses to appoint an appraiser, the Court may appoint an umpire, and that one appraiser and the umpire shall make the appraisal.

We do not find that the Courts of any of the other states have ever based upon this proposition, although the language of the Minnesota statute, upon which this interpretation is based, is not substantially different from the language of the statutes of many of the states.

[illegible] statute requires that, upon the demand of either [illegible] appraisal shall be had, and an appraiser shall be [illegible] by each the insured and insurer, it is not material [illegible] whether the refusal of the insurer to comply with the statute and appoint an appraiser is a

waiver of the right to an appraisal, or whether it gives the right to go ahead and have an award made by the remaining appraiser and the umpire. Surely, the insurer has no greater right to be relieved from the compulsory effect which the appraisal requires than has the insured, nor has a foreign corporation any greater right to freedom from a compulsory appraisal than a domestic insurance corporation, nor than the insured himself.

The Supreme Court of the State of Minnesota has interpreted the standard policy, not as a common law arbitration, as contended by counsel, but merely in the nature of a common law arbitration as distinguished from a statutory arbitration, but has specifically limited it to the determination of the amount of the loss, leaving all questions of general liability to judicial decision, confining the arbitration to determining the amount of the loss, and making it a condition precedent to the cause of action.

Glidden Co. et al. v. Retail Mut. Fire Ins. Co. of Minn., 223 N. W. 310.

This limiting of the appraisal to the amount of the loss, without in any way determining the liability of the insurance Company, distinguishes the case at bar from the cases cited by counsel on pages 20 and 21 of Appellant's brief.

The Minnesota Supreme Court has also held that the policy is construed as giving both insured and insurer the right of an appraisal, and that it does not deprive the Courts of jurisdiction.

Itasca Paper Co. v. Niagara Fire Ins. Co., 173 Minn. 73, 220 N. W. 426.

The extent to which the Court has jurisdiction is set forth in the case of

Harrington v. Agricultural Ins. Co. of Watertown, N. Y., 179 Minn. 510, 229 N. W. 792.

"But where such an award is so grossly inadequate or excessive as to be in effect a fraud, it may be vacated * * * as where the referees had no proper appreciation of the kind of property with which they were dealing, or of the damage done it. For such reasons alone, an award may be so grossly inadequate or excessive as to be the equivalent of fraud. * * Furthermore, although the appraisers of a fire loss must determine what property was covered in order to arrive at the amount of damage, the right of the insurer to have a judicial determination of liability includes the right to a judicial determination of the coverage of the policy."

This brings us down to the crucial question.

Is such a statutory provision in the standard fire insurance policy so unreasonable as to be beyond the police power of the state, and unconstitutional as denying to the appellant due process of law, the equal protection of the law, liberty of contract, and violative of the provisions of the fourteenth amendment of the Constitution of the United States in requiring a foreign insurance corporation to submit to it as a condition of doing business in the State of Minnesota?

Appellant claims that the law is unconstitutional on all of these grounds, and bases his contention upon the proposition—

First: That an insurance corporation is no different from a corporation engaged in an ordinary commercial enterprise.

Second: That the police power of the state has the same limitations as to an insurance corporation as to any other foreign corporation.

Third: That there can be no distinction between compulsory appraisal of the amount due on the policy and any other condition the state may seek to impose, such as limiting appeal to the Federal Court.

Fourth: That the public welfare is not promoted by compulsory appraisal of damages.

Counsel is compelled to admit that the decisions of this Court establish the doctrine that the insurance business is affected by the public interest, and, therefore, subject to state regulation, but seeks to limit this to the correction of some evil.

That counsel's analogy between an insurance corporation and a corporation engaged in ordinary mercantile business is a false one has been demonstrated again and again by the decisions of this Court.

While doubtless there could be a state statute that might go beyond the limits of reasonable public policy, no such case has ever come before this Court, but in every instance the regulation of the insurance business, by state statute has been upheld by the Court. This would not include a state statute discriminating against a foreign corporation engaged in the insurance business as against a local corporation, as in the imposition of a different measure of taxation between the foreign corporation and a domestic one, or a statute prohibiting removal by a foreign corporation of cases to the Federal Courts.

While the limits of such state regulation can only be marked out as the cases arise, the Courts so far have held valid state statutes, limiting the amount of new business; requiring the local investment of a certain percentage of reserves; regulating the premium rates; forbidding combination as to rates, commissions or manner of transacting business; the requirement of license; a provision that no misrepresentation in obtaining

a life insurance policy shall be material, unless actually contributing to the contingencies on which the policy becomes due; valued policy acts; acts providing standard forms; liquidated claim for the full amount of the policy in case of total loss; requirement of payment of damages or attorney's fees in case of delay in payment; requiring designation of State Insurance Commissioner as agent for accepting service; limitation of dividends; the publishing of accounts; requiring deposit in money or bonds; confining the business to corporations; limitation of risk; restriction of defenses to actions brought on policies; unearned premium reserves; provision that policies of hail insurance shall take effect within twenty-four hours from application, unless notice given to the contrary; requiring incorporation in contracts of insurance against liability for injury by operation of automobile of a provision subrogating the injured person to the rights of the insured in case of insolvency.

12 C. J. Sec. 898;
German Alliance Ins. Co. v. Hale, 219 U. S. 307;
N. W. Nat. Life Ins. Co. v. Riggs, 203 U. S. 241;
Nat. Union Fire Ins. Co. v. Wanberg, 260 U. S. 71;
Orient Ins. Co. v. Dagg, 172 U. S. 557;
Whitfield v. Aetna Ins. Co., 205 U. S. 489;
German Alliance Ins. Co. v. Lewis, 233 U. S. 389;
Farmers & Merchants Ins. Co. v. Dobney, 189 U. S. 300;
John Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. 73;
Fidelity Mutual Life Ins. Co. v. Mettler, 186 U. S. 308;
Tyson & Bro. v. Banton, 273 U. S. 418, 436, 437;
Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U. S. 126.

The extent of the police power of the state over corporations engaged in insurance and corporations engaged in ordinary

business is most carefully differentiated, and the reason for such broad control over insurance companies is distinctly pointed out in the recent decision of this Court in the case of

Tyson & Bro. v. Banton, 273 U. S. 418, 437,

and the Court there uttered a warning against invoking decisions upon statutes regulating insurance companies as precedents for the determination of cases involving corporations doing other kinds of business.

This brings us to the next proposition.

Is a compulsory provision requiring the appointment of appraisers to fix the amount of loss in case of disagreement a reasonable regulation, and one that contributes to the public welfare?

Long before the standard form of policy was required by statute in any of the states, the provision for the appraisal of the loss was a common one in insurance policies.

This Court, in the case of

Red Cross Line v. Atl. Fruit Co., 264 U. S. 108,

points out that the submission of maritime controversies to arbitration has long been common practice, going back to the eighteenth century. It was not, however, until the well known English case of

Scott v. Avery, 5 House of Lords, 811-854,

decided more than seventy-five years ago, that such a provision for appraisal was upheld as a legal one, and from that time to the present, such provisions for arbitration or appraisal have been of almost universal acceptance and use in all forms of fire insurance policies, until today there is scarcely a state in the Union that does not provide for such requirement by statute, and the same provision is carried out in the statutes of all

the provinces of Canada, and by the law of England and Scotland.

It is interesting and important to note that this provision for appraisal of the loss in fire insurance policies was thus the result of voluntary contract long before it was made compulsory by statute, and the statutory standard policy, as now used in Minnesota and most other states, is merely the adoption by statute of the form in common use at that time. Its use in the United States doubtless was extended and encouraged by the decision of this Court in the case of

Hamilton v. Ins. Co., 136 U. S. 242, 34 L. ed. 419,

in which Justice Gray, in commenting upon the provisions of the policy, which required the insured to submit to arbitration, said:

> "Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a *reasonable* method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

See also

Hamilton v. Ins. Co., 137 U. S. 370;

Red Cross Line v. Atl. Fruit Co., 264 U. S. 109, 68 L. ed. 582.

It would be a strange development of the law if a provision, voluntarily inserted in policies of insurance for nearly a century, for the appraisal of the amount of loss should, when required by statute to be put into all insurance policies, be held to be an unreasonable limitation upon the constitutional rights of the insurer or the insured.

It would not be an unnatural presumption to assume that a provision, put in a contract between an individual and an in-

surance corporation, substituting appraisers in place of a jury to determine the amount of loss, was primarily for the protection of the insurance company, and this is further emphasized by the history of this legislation in the State of Minnesota, where, in the first instance, the appraisal was made binding only upon the insured, and not upon the insurance company. It would seem strange that a procedure which has stood the practical test of a century of common usage in fire insurance policies, should at this late date prove to be an unreasonable limitation of the constitutional rights of the insurance company. Not only has the voluntary provision for arbitration of policies of insurance been upheld by this Court, and all of the American and English Courts, but the statutory requirement of the inclusion of this provision of appraisal in the standard policy has been upheld by every state and Federal Court that has passed upon the question.

Orient Ins. Co. v. Skellet Co., 28 Fed. (N. S.) 968;
Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73;
Glidden Co. et al. v. Retail Hdwe. Mut. Fire Ins. Co., 233 N. W. 310;
Opinion to the Maine Senate, 97 Me. 590;
Continental Life Ins. Co. v. Hattabough, 21 Ida. 285; 121 Pac. 81;
See also Coolidge Briefs on Ins., 2nd ed., Vol. 7, page 6135;
Grady v. Home Fire & Marine Ins. Co., 27 R. I. 145-62 Atl. 173;
Continental Fire Ins. Co. of N. Y. v. Titcomb, 7 Fed. (2nd) Series, 883.

Arbitration as a method of settling disputes has at all times been favored by the Courts of this country, so long as they do not deprive the Court of jurisdiction, and counsel for appellant

does not claim that this provision in the case at bar is invalidated for that reason.

Burchell v. Marsh, 17 How. 344-15 L. ed. 96,
and also the compilation of cases appearing in
47 L. R. A. N. S., page 342.

It will be apparent to the Court from the history of the development of the boards of appraisal that the parties themselves, long before the enactment of statutes making compulsory such appraisal of the amount of loss, had found it necessary to voluntarily incorporate such provision in fire insurance policies. The reason for this was also apparent, as it is a matter of common knowledge that the determination of the losses to property can be more readily and accurately determined by an examination of the property itself, rather than by establishing the loss by evidence produced before a Court or jury.

The Court can take judicial notice of the fact that fire insurance policies are written which cover vast stocks of merchandise, as well as buildings, where tremendous difficulty is encountered in determining the exact amount of the loss. If the insured, as well as the insurer, were compelled, in case of dispute, to wait until the controversy came on for trial before a Court or jury, it would be necessary for the property to be held in status quo, in order to properly present the evidence to the Court or jury, occasioning great inconvenience and further loss upon the insured, as well as upon the insurer. The expense and inconvenience of bringing in the articles of merchandise which might be damaged and showing them to a jury demonstrates the necessity of an arbitration provision such as the one in question. The impossibility of a jury or a Court being taken to the place where the loss occurred, whether it be a building or a stock of merchandise, is evident to the Court. In order to

accurately determine the loss it may be, and often is, necessary to make an examination of the books of the insured, to determine the amount of merchandise that the insured had on hand at the time of the loss.

It is evident to the Court that in a great many, if not most of the cases where loss occurs, the damage must necessarily be determined by experts, who, in order to determine this question, must make a very minute and exhaustive examination of the property damaged by the fire. That the use of men with peculiar qualifications for such determination is common in everyday business is a well known fact. A building contract leaves the estimates and measurements to the architect; the excavation contract to the engineer; the lumber contract to the scaler, and in every case his determination of the amount is very often made binding and conclusive upon the parties, except for fraud or gross mistake. Such customs grew up from the very necessities of business, and the use of appraisers in fixing the amount of insurance losses has had the same origin in the necessity of the case, and its extension has been even greater than in those other forms of human endeavor.

More than forty years ago Justice Vanderburgh, of the Supreme Court of Minnesota, recognized this necessity when he said:

> "It is eminently proper that in such cases, involving the examination of books, and a large number of items, and the extent of the damage, it shall be determined by three men as appraisers. It is a matter proper for reference, and the controversy may generally be more satisfactorily and speedily determined in that way than in any other."

See Gasser v. Sun Fire Office, 42 Minn. 315, 319, 320;
Mintz v. Armenian Ins. Co., 79 Pa. 481;
Johnson v. American Fire Ins. Co., 41 Minn. 396.

If years of experience have proven that such a method of determination of the amount of a fire loss is more satisfactory, and results in a more speedy determination than by the verdict of a jury, then it cannot be said to be an unreasonable provision for insertion in the statutory standard policy.

The use of the appraisal as a manner of determining the amount of loss in case of fire has the sanction of one hundred years of voluntary business use. It has existed for nearly half a century in the statutory provisions of the standard policy in a large number of the states of the Union. Not only have the insurer and the insured found it a practical, satisfactory and speedy remedy, but the legislatures of the various states have, without exception, adopted it as a matter of state policy. The legislatures must have considered the difficulties of submitting such a determination to a jury, and must have been moved by the delays and losses and expense that would be incurred thereby, and the legislature is the judge of the method to be pursued to attain the end sought in the public welfare, so long as they violate no rights of citizens.

The language of Justice McKenna, in the case of

German Alliance Co. v. Lewis, 233 U. S. 387, 412,

has peculiar application to the situation in the case at bar, in the light of the long, voluntary acceptance of the use of this method of appraisal of the damage in case of fire, and the embodying of the same into statute by the law-making bodies of all English speaking peoples. The Court said:

> "Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence

saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis."

We submit that the power of the legislature to make compulsory the use of the appraisal in the standard fire insurance policy is not open to serious dispute, and whether this comes under the police power, as is generally contended, or under the power to regulate corporations, domestic and foreign, as is sometimes contended, is not material.

New York Life Ins. Co. v. Horbison, 199 Mass. 190, 199.

No serious contention can be made here that this statutory provision is violative of the fourteenth amendment, upon the ground of a discrimination against the rights of a foreign corporation. The standard policy is required of both a domestic and a foreign corporation, and no distinction is made between the two.

In the case at bar, two of the insurance companies are Minnesota corporations, and appellant, the third defendant, is a Wisconsin corporation, but the standard form was required equally of all three.

This Court, in the Riggs case, upheld a statute prohibiting a foreign insurance corporation from setting up a misrepresentation, not contributing to the death of the insured, as a defense to an action on its policy, and pointed out that, if the statute there in question was not invalid as to life insurance companies of Missouri, the state was not prohibited from making its provision applicable to corporations of other states doing business in its territory, with its sanction or under its license.

The Court said:

"Now, if the statute in question is not invalid as to life insurance corporations of Missouri, it is not perceived that

the state may not make its provisions applicable to corporations of other states doing business in its territory with its sanction or under its license. That Missouri could forbid life insurance companies of other states from doing any business whatever within its limits, except upon the terms prescribed by the statute in question, cannot be doubted, in view of the decisions of this court. If it could go that far, why may it not declare, as it has in effect done, by this statute, that its provisions shall apply to foreign life insurance companies doing business in Missouri under its license? It would, indeed, be extraordinary if the state could compel its own life insurance companies to respect this statute, but could not enforce its provisions against a foreign corporation doing business within its limits, with its consent, express or implied—especially against one which, as is the case here, came into the state for purposes of business after such statutory provisions were enacted. As the present statute is applicable alike to all life insurance companies doing business in Missouri, after its enactment, there is no reason for saying that it denies equal protection of the laws. Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the 14th Amendment. The liberty referred to in that Amendment is the liberty of natural, not artificial, persons. Nor, in any true constitutional sense, does the Missouri statute deprive life insurance companies doing business in that state of a right of property. This is too plain for discussion."

N. W. Nat. Life Ins. Co. v. Riggs, 203 U. S. 243.

This entire absence of any discrimination between a foreign and a domestic insurance company distinguishes the statute in the case at bar from the case cited by counsel of

Hanover Fire Ins. Co., 272 U. S. 494,

in which case Chief Justice Taft emphasizes that the occupation tax there imposed upon the net receipts of foreign insurance companies admitted to do business in Illinois was

"A heavy discrimination in favor of domestic insurance companies of the same class and in the same business."

and likewise distinguishes it from the case of

Terral v. Burke Construction Co., 257 U. S. 529,

unless the Terral case is to be understood, as claimed by counsel, as overruling every decision of this Court upholding state statutes regulating insurance companies, a conclusion which was rejected by the Supreme Court of the State of Minnesota, in

The Glidden Co. et al. v. Retail Hdwe. Mut. Fire Ins. Co., 233 N. W. 310,

and which is likewise disproved by the later decisions of this Court in

Nat'l. Ins. Co. v. Wanberg, 260 U. S. 71;

Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U. S. 124,

and by the distinction pointed out in

Tyson & Bro. v. Banton, 273 U. S. 418.

In all of the last three cases the doctrine of state control over insurance companies is repeated and extended and distinctly differentiated from the control over other corporations.

The cases cited by counsel overruling the Kansas Industrial Arbitration statute are clearly distinguished from the case at bar for, unlike the business of insurance, the business there involved was held not affected by public interest.

II.

The Policy Here in Question Was a Voluntary Contract.

Counsel points out that the Supreme Court of Minnesota in the Itasca Paper Company case held that the policy, though in the form prescribed by statute, was a voluntary contract. Counsel then suggests that, inasmuch as the decision in the pending case makes no allusion to the theory of voluntary contract, the Minnesota Court had abandoned that position. We submit that this is not warranted by the decision in the pending case, for the Court there states that the Appellant asked a reconsideration of the questions involved upon the ground that later Federal cases had changed the doctrine of the Itasca Paper Company case, and the Court, after going over the matter, concludes

> "After a thorough reconsideration, we follow the Itasca case, and extended further discussion is not necessary."

We fail to find in this any departure from the doctrine of the Itasca Paper Company case. On the contrary, it is reaffirmed without being repeated verbatim.

The Minnesota Supreme Court, long prior to the Itasca Paper Company case, held such a policy, though in the prescribed statutory form, a voluntary contract.

Kollitz v. Equitable Ins. Co., 92 Minn. 234.

The higher Courts of other states have held the same.

Flatley v. Phoenix Ins. Co., 95 Wis. 618;

Dunter v. Westchester Fire Ins. Co., 104 Me. 372;

Ebner v. Ohio State Life Ins. Co., 69 Ind. App. 32.

The Circuit Court of Appeals of the 8th Circuit, in the case of Continental Ins. Co. of N. Y. v. Titcomb, 7 Fed. 2nd Series, 833,

made a similar ruling.

The Circuit Court of Appeals of the 9th Circuit, in the case of Chun Ngit Mgan v. Prudential Ins. Co. of America, 9 Fed. Rep. 2nd Series, 340,

made a similar holding under the Hawaii statute.

The Circuit Court of Appeals of the 8th Circuit, in the recent case of

Orient Ins. Co. v. Skellet, 28 Fed. Rep. 2nd Series, 968

again held that

"although the statute prescribed the terms of the policy, it was contractual when issued, bound the parties as to the mode of procedure in ascertainiing the loss, but did not oust the courts of jurisdiction on the question of liability of the insurer."

In this connection it should be noted that in the Wanberg case cited above, 260 U. S. 71, Chief Justice Taft pointed out that the statute

"does not force a contract on the company. It need not accept an application at all, or it can make its arrangements to reject one within twenty-four hours."

And again, in the Smart case, 267 U. S. 124, Chief Justice Taft again remarks:

"It is to be remembered that the assumption of liability by the insurance company under Section 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so."

And again in the Riggs case above set forth, 203 U. S. 241, Justice Harlan remarks:

"If a life insurance corporation does not approve such a restriction upon the conduct of its affairs, it is privileged to cease doing business."

While these statements of the Court are to be taken in connection with the statutory provisions there involved limiting the rights of the insurance companies, they do suggest that, when an insurance company, domestic or foreign, accepts the provision of a statute, provided there is no discrimination between the two, and issues its policy pursuant thereto, it cannot be heard to say that the contract was involuntary, at least so long as the statutory regulation is not a discriminatory one.

While in the cases last-cited this Court has indicated that it was optional with the companies either to accept the provision of the statute or refrain from doing business, the Appellee does not rest its claim that the contract here involved was voluntary solely upon that basis. The statute which Appellant complains of, has been on the statute books of Minnesota since 1913 in its present form. Fire insurance companies doing business in the State of Minnesota have been writing contracts in the form prescribed by the statute since that time. They have tendered their contracts to the insured with the statutory arbitration provision incorporated therein. They have collected premiums from the insured upon this form of contract, and the insured necessarily has relied upon the fact that, in case of loss, his claim would be speedily and easily adjusted by a board of arbitration, and that he would not have his loss determined at the unskilled hands of a jury. Until the Abramovitz case, supra, decided in 1927, no fire insurance company had ever sought to test out the validity of the statute, or attempted to repudiate the provision thereof requiring that the loss be determined by a board of arbitration. Millions of dollars have been collected by the insurance companies since the enactment of this statute

from the insured, upon contracts which the insurance companies tendered, which contained the arbitration clause which the companies now claim deprives them of their constitutional rights, by being arbitrary and unreasonable.

Counsel apparently in his brief, wherein he recites numerous authorities and advances numerous arguments to the effect that this is an involuntary contract, completely overlooks the fact that, if the insurance companies did not desire to write a policy in the standard form, and if the law providing for a board of arbitration was unconstitutional and void, as they now claim it to be, it was not necessary for them to observe it. They could have tendered policies to the insured without this provision being contained therein, and could have continued doing business with such a policy until such time as the state attempted to punish the companies by revoking their license. They could have tested the constitutionality of this statute in Court many years ago, instead of waiting until a substantial loss occurred, and then try to evade the payment thereof, as fixed by the Board of Arbitration by claiming the provision of the statute requiring a Board of Arbitration to determine the loss to be void.

In the case of

Itasca Paper Co. v. Niagara Fire Ins. Co., 220 N. W. 425,

the Supreme Court of Minnesota, in commenting upon this question, said:

> "It is argued that this construction forbids the company raising the question of the constitutionality of the law and that it must submit or go out of business in the state. But such is not the case. No one can be compelled to observe an unconstitutional law. There are ways to raise such questions. Citing Ludwig v. Western Union Tel. Co., 216 U. S. 146, 39 S. Ct. 280, 54 L. Ed. 423; 32 C. J. 243."

The Appellees in this case well might claim that the insurance companies have waived the right to now question the constitutionality of the provision of the statute here involved, or they might claim that the company, through acquiescence in the law, and by contracting with the insured on the basis of a standard form of policy, is now estopped from questioning the validity of the law in this case. But it makes little difference whether the Appellees in this case rest upon the theory of waiver or estoppel or voluntary contract; the result remains the same.

It cannot be that the insurance company, from the year 1913 until the present time can have carried on the business of fire insurance in this State, tendered the standard form of policy to the insured, and the minute that the board of arbitration, provided for in the statute and the policy, returns an award or fixes a loss at a greater sum than it deems satisfactory to it, can promptly repudiate that portion of the policy and say to the insured that "You must resort to a jury to determine your loss."

Respectfully submitted,

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